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No. 80-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

SUN PETROLEUM PRODUCTS COMPANY,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN A. McGUINN
Counsel of Record
GARY L. LIEBER
FARMER, WELLS, McGUINN, FLOOD & SIBAL
1000 Potomac Street, N.W.
Washington, D.C. 20007

Attorneys for
Sun Petroleum Products Company

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QUESTIONS PRESENTED

1. Whether a Federal appellate court reviewing a decision by the Occupational Safety and Health Review Commission has jurisdiction to consider an issue neither raised before the Agency nor ruled upon by the Agency.

2. Whether the Secretary of Labor has the authority to unilaterally withdraw from a settlement agreement he has executed with a company over a contested citation under the Occupational Safety and Health Act where a) the Secretary has alleged no breach of the agreement; b) the record contains no evidence that the settlement agreement was contrary to the public interest; and c) where the Company has taken action in reliance on the settlement.

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RAY MARSHALL, SECRETARY OF LABOR,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner Sun Petroleum Products Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on May 29, 1980.

I.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 622 F.2d 1176 (3rd Cir. 1980) and appears in the Appendix at pp. 1a-36a. The Court's denial on June 26, 1980 of the Petitioner's Motion for Rehearing and Suggestion for Rehearing in Banc appears in the

Appendix at p. 37a. The decision of the Occupational Safety and Review Commission is reported at 7 OSHC 1306 (1979) and appears in the Appendix at pp. 38a-44a. The Administrative Law Judge's Order Granting Stipulated Settlement appears in the Appendix at pp. 45a-48a.

II.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 29, 1979. A timely petition for Rehearing and Suggestion for Rehearing in Banc was denied on June 26, 1980 and this petition for certiorari is being filed within ninety days of this date. The Court's jurisdiction is being invoked under 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29 states in pertinent part:

> § 654. Duties of Employers and Employees
>
> (a) Each employer—
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> § 660. Judicial Review
>
> (a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain

a review of such order in any United States court of appeals for the circuit in which a violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. . . . No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. . . .

(b) The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) of this section shall govern such proceedings to the extent applicable. . . .

§ 661. Occupational Safety and Health Review Commission

(i) A hearing examiner appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such hearing examiner by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the hearing examiner shall become the final order of the Commission within thirty days after such report by the hearing examiner, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

IV.

REGULATORY PROVISIONS INVOLVED

29 C.F.R. § 2200.91 states in pertinent part:

DISCRETIONARY REVIEW; PETITIONS FOR; STATEMENTS IN OPPOSITION.

(a) A party aggrieved by the decision of a judge may submit a petition for discretionary review. An aggrieved party that fails to file a petition for such review by the Commission may be foreclosed from court review of any objection to the judge's decision. *Keystone Roofing Co., Inc.* v. *Dunlop,* 539 F.2d 960 (3rd Cir. 1976).

* * *

(b)(3) Petitions for review of a Judge's decision may be filed directly with the Executive Secretary subsequent to the filing of the Judge's report. Such petitions will be considered to the extent that time and resources permit. Parties filing such petitions should be aware that any action by a Commission Member directing review must be taken within thirty (30) days following the filing of the Judge's report.

(4) In the case of proposed settlements or other proposed dispositions by consent of all parties, petitions for discretionary review shall not be allowed, except for good cause shown.

(c) A petition should contain a concise statement of each portion of the decision and order to which exception is taken and may be accompanied by a brief of points and authorities relied upon. The inclusion of precise citations to the record or legal authorities, as the case may be, will facilitate prompt review of the petition.

(d) Failure to act on such petition within the review period shall be deemed a denial thereof.

* * *

29 C.F.R. § 2200.91a states in pertinent part:

REVIEW BY THE COMMISSION

(a) Review is a matter of sound discretion of a member of the Commission.

(b) In exercising discretion, a Commission member will consider assertions of the following:

(1) A finding of material fact is not supported by a preponderance of the evidence.

(2) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.

(3) A substantial question of law, abuse of discretion, or policy is involved.

(4) A prejudicial error of procedure was committed.

(c) When a petition for discretionary review is granted, review shall be limited to the issues specified in the petition, unless the order for review expressly provides differently.

(d) At any time within thirty days after the filing of a decision of a judge, a case may also be directed for review by a member upon his own motion upon any ground that could be raised by a party, but the issues would normally be limited to novel questions of law or policy or questions involving conflict in Administrative Law Judges' decisions. Any direction for review shall state the issues with particularity. Except in extraordinary circumstances, the Commission's power to review is limited to issues of law or fact raised by the parties in the proceedings below.

V.

STATEMENT OF THE CASE

This case involves significant questions of law, policy and procedure under the Occupational Safety and Health Act. In its decision setting aside the decision of the Occupational Safety and Health Review Commission, and granting the petition of the Secretary of Labor,[1] the Third Circuit held that the Secretary of Labor is completely free to withdraw from a settlement agreement entered into with an employer at any time prior to the issuance of a final order by the Review Commission even though the Secretary had not effectively raised the question of withdrawal from the agreement before the Commission, the Commission had not directed review on the merits of the agreement and the Secretary had presented no evidence in support of its unilateral withdrawal from the agreement.

The genesis of the case goes back to a July 8, 1976 OSHA inspection of the Marcus Hook facility operated by Sun Petroleum Products Company. Following the inspection, the Secretary of Labor issued a citation on August 3, 1976, alleging that the Company had committed two violations of OSHA safety standards. The citations stated as follows:

> 29 CFR 1910.132(a): Protective fire resistant clothing was not provided for operating personnel in Plant 8C-Lub [sic] Oil unit to protect them from the hazard of fire, as well as skin contact of

---

[1] The instant case was consolidated for argument and decision with the Union's Petition for Review of the Commission's decision on a different issue.

> crude oil and its distallates [sic] resulting from splashes and leakes during turn-around operations.
>
> General Duty Clause, Public Law 91-596, Section 5(a)(1): The employer did not furnish to each of his employees employment and a place of employment, which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to his employees in that: On June 19, 1976 from 8:00 p.m. to midnight, the area around the H-2 Heater in Plant 8-C, Lub [sic] Oil Unit was not monitored for combustible gases or vapors during the turn-around operation, when two 14-inch pipe outlets were open for venting purposes. Part of this operation involved lighting of gas burners by employees in close proximity to the vents.

The Company was assessed $700 penalties for each violation. An abatement date of October 3, 1976 was proposed for the first citation and an immediate time for abatement for the second one.

On August 24, 1976, the Company filed a notice of contest challenging all aspects of the citations. The notice of contest triggered the filing of an administrative complaint by the Secretary of Labor on September 13, 1976. On September 30, 1976, the Oil, Chemical & Atomic Workers International Union and its Local 8-901 sought party status. By Order of the Administrative Law Judge assigned to the case, on October 21, 1976, party status was afforded to the local Union. On November 9, the Company filed its answer to the complaint and denied the substantive allegations.

Prior to any hearing on the matter, the Secretary of Labor and the Company negotiated a settlement agreement that was executed on January 10, 1977. The Union fully participated in the discussions regarding settlement and advanced their views to the Secretary prior to his entering into the agreement. The settlement agreement [attached in its entirety at pp. 49a-54a of the Appendix] resolved all outstanding issues and provided for the following:

1. A requirement for fire-retardant clothing for persons in the immediate vicinity of a burner in a fired heater during the time of the lighting of such pilot or first burner during the course of turnaround operations.
2. In such situations a requirement of a gas test in the firebox and in areas in the immediate vicinity of the fired heater or burner where gases may be present.
3. Such gas tests "will be taken by persons knowledgeable in the care, use, and reading of the instrument, and familiar with locations where combustible gases or vapors may be present or have collected."
4. A requirement of recording such gas tests.
5. Development and distribution of a comprehensive gas testing manual.
6. Certain engineering and procedural changes as outlined in the two appendices to the settlement agreement.
7. Agreement to continuing compliance with the Act.
8. A statement that the settlement agreement had been served on the Union "in accordance with Commission Rule 7, and the Order dated October 21, 1976".

9. A reduction in the total penatlies assessed from $1,400 to $1,000.

10. A withdrawal by the Company of its notice of contest.

On January 19, 1977, the Union filed objections to the settlement agreement. The Company contested the Union's right to make objections to the substance of the agreement and a pre-hearing conference was held on February 8, 1977, to consider the Company's position. The ALJ sustained the Company's position on the basis that the Union's objections dealt with the substantive terms of the settlement and not the period of time for abatement as set forth in 29 U.S.C. § 659 (c). Thereafter, on April 25, 1977, the ALJ issued a formal order approving the settlement.

On May 24, 1977, pursuant to Section 12(i) of the Act [29 U.S.C. § 661(i)], Commissioner Cleary of the Occupational Safety and Health Review Commission directed review on the following two issues:

> (1) Whether the Administrative Law Judge erred in concluding that the authorized employee representative did not challenge the reasonableness of the abatement period embodied in the proposed settlement agreement?
>
> (2) Whether the Administrative Law Judge erred in concluding that the Commission lacks jurisdiction to entertain the authorized employee representatives objection to the proposed settlement agreement?

The Secretary of Labor then filed a series of motions for extensions of time to file its brief. The Secretary received an additional ninety days to file its brief. The Company opposed the Secretary's third request

and the Commission denied that request on October 5, 1977. The Company and Union filed timely briefs on the issues on which review was directed. The Secretary never filed a brief.

On September 18, 1978, some *eleven months* after the Commission denied the Secretary's third request for an extension of time within which to file its brief, the Secretary filed a self-styled "Response to Direction for Review" in which he stated that he had reconsidered the settlement agreement with respect to the clause pertaining to gas testing and had concluded that the settlement should be set aside. That portion of the settlement agreement stated in pertinent part that gas tests "will be taken by persons knowledgeable in the care, use, and reading of the instruments, and familiar with locations where combustible gas or vapors may be present." During this period of time the International Union lobbied *ex parte* the Washington OSHA office to adopt the Union's view that only persons classified for wage purposes as laboratory gas testers should be permitted to take gas tests irrespective of any other person's qualifications. This had been a longstanding labor relations issue between the parties. The local Union in contract negotiations in 1977 and 1979 agreed that operating personnel and not necessarily laboratory gas testers could take gas tests.

This reply was not responsive to the Commission's Direction for Review.

Furthermore, the Secretary did not explain how he had arrived at this reversal in position. Nor did he contend that the Company was not fully abiding by the agreement. He also failed to even allude to the fact that this response was untimely by almost a year.

On April 27, 1979, by a one-to-one vote, the Commission affirmed the ALJ's decision and order. The Commission relegated the Secretary's position to a footnote in which it held that the Secretary's "Response" was not properly before it:

> The Secretary's position is set forth in his "Response to Direction for Review", which was filed more than eleven months after the parties were notified that the Secretary's third request for an extension of briefing time was denied. Sun Petroleum has moved to strike the Secretary's response as untimely. Chairman Cleary's disposition is based solely on the Union's right to raise objections to a settlement agreement in an action instituted by an employer's notice of contest, and is arrived at independent of the Secretary's response. He thus considers the motion to strike to be moot. Commissioner Barnako would grant the motion to strike, and has not considered the Secretary's response.

The Secretary filed a petition for review in the instant case with United States Court of Appeals for the Third Circuit. The Union filed a separate petition on the questions raised by the Commission's Direction for Review. These cases were consolidated for argument and decision.

In its decision which issued on May 29, 1980, the Court held that the Secretary of Labor has the absolute authority to withdraw from a settlement agreement for any or even no reason as long as the withdrawal preceded the issuance of a final order by the Commission. The Court's reasoning for this holding was that as the person most responsible for the enforcement of the Act, the Secretary was acting within his authority in withdrawing from any settlement

agreement regardless of the nature of the agreement or the grounds given for his *ex parte* action. The Court referred to the following statement by Senator Williams, the chief sponsor of the Act in the Senate, as the basis for their unbridled authority:

> [T]he majority of our Committee wisely concluded that the Secretary of Labor ought to be assigned the responsibility for promulgating and enforcing the standards under this Act, subject to those provisions of the Administrative Procedure Act which insure that considerations of due process are fully satisfied.

The Court, however, never indicated what due process considerations the Secretary was required to follow prior to his withdrawal from the agreement.

Moreover, the Court did not consider the Company's threshhold contention that the Court lacked jurisdiction to consider the Secretary's petition because its withdrawal was not *effectively* urged before the Review Commission. The Court failed to address this issue, which the Company initially raised in its Motion to Dismiss Secretary's Petition and to Strike Brief, not withstanding the established body of law, including decisions of this Court, that stand for the proposition that only issues *effectively* urged before the administrative agency having jurisdiction over a particular proceeding are subject to appellate review. For this reason, the Company filed a Petition for Rehearing and Suggestion for Rehearing in Banc on June 12, 1980. That Petition was denied on June 26, 1980.

VI.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Is Contrary To Decisions Of This Court And The Decisions Of United States Courts Of Appeals And Raises Significant And Recurring Problems Concerning The Decision-Making Process Of The Occupational Safety And Health Review Commission And The United States Courts Of Appeal.

In granting the Secretary's Petition for Review and thereby agreeing to set aside the settlement agreement, the Court ignored important and well-established principles of administrative law enunciated by this Court and other Circuit Courts of Appeal. The decisions threatens the very fabric of administrative agency decision-making by signalling to all litigants that limitations relating to the exercise of agency jurisdiction can be sidestepped, if not totally ignored.

In a series of cases, this Court has fashioned the well-established principle that issues not properly raised before and ruled upon by an administrative agency are not subject to judicial review. *United States* v. *L. A. Tucker Truck Lines,* 344 U.S. 33, 37 (1952); *Securities and Exchange Commission* v. *Chenery Corporation,* 332 U.S. 194 (1947); *Unemployment Compensation Commission* v. *Aragan,* 329 U.S. 143, 154 (1946). Significantly, within the past few months, this principle has been applied by the Court to the Occupational Safety and Health Act. *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute,* —— U.S. ——, 100 S.Ct. 2844, 2858 at n.31 (1980). The purpose of this principle is clear and was suc-

cinctly spelled out by this Court in *U.S.* v. *L. A. Tucker Truck Lines*:

> Simple fairness to those who are engaged in the tasks of administration, and to litigants requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice. 344 U.S. at 37.

The Occupational Safety and Health Act delineates specific procedures for the review of contested citations by the Occupational Safety and Health Review Commission. The Act also contains clear and specific means by which an adverse Commission ruling can be judicially reviewed. Section 29 U.S.C. § 661(i) states in pertinent part that "[T]he report of the hearing examiner shall become the final order of the Commission within thirty days after such report by the hearing examiner, unless within such period any Commission member has directed that such report shall be reviewed by the Commission." The Commission's own regulations set forth one such method for a party to file a Petition for Discretionary Review in which the Commission is free to accept or reject a case for review. That method is codified by Commission regulations which state in pertinent part:

> DISCRETIONARY REVIEW; PETITIONS FOR; STATEMENTS IN OPPOSITION.
>
> (a) A party aggrieved by the decision of a judge may submit a petition for discretionary review. An aggrieved party that fails to file a petition for such review by the Commission may be foreclosed from court review of any objection

to the judge's decision. *Keystone Roofing Co., Inc.* v. *Dunlop,* 539 F.2d 960 (3rd Cir. 1976).

* * *

(b)

(3) Petitions for review of a Judge's decision may be filed directly with the Executive Secretary subsequent to the filing of the Judge's report. Such petitions will be considered to the extent that time and resources permit. Parties filing such petitions should be aware that any action by a Commission Member directing review must be taken within thirty (30) days following the time of the Judge's report.

(4) In the case of proposed settlements or other proposed dispositions by consent of all parties, petitions for discretionary review shall not be allowed, except for good cause shown.

(c) A petition should contain a concise statement of each portion of the decision and order to which exception is taken and may be accompanied by a brief of points and authorities relied upon. The inclusion of precise citations to the record or legal authorities, as the case may be, will facilitate prompt review of the petition.

(d) Failure to act on such a petition within the review period shall be deemed a denial thereof.

29 C.F.R. § 2200.91

The second method is by *sua sponte* review by the Commission at the direction of one or more of its members. That method is also delineated in the Commission's regulations.

REVIEW BY THE COMMISSION

(a) Review is a matter of sound discretion of a member of the Commission.

(b) In exercising discretion, a Commission member will consider assertions of the following:

(1) A finding of material fact is not supported by a preponderance of the evidence.

(2) The decision is contrary to law or the duly promulgated rules or decisions of the Commission.

(3) A substantial question of law, abuse of discretion, or policy is involved.

(4) A prejudicial error of procedure was committed.

(c) When a petition for discretionary review is granted, review shall be limited to the issues specified in the petition, unless the order for review expressly provides differently.

(d) At any time within 30 days after the filing of a decision of a judge, a case may also be directed for review by a member upon his own motion upon any ground that could be raised by a party, but the issues would normally be limited to novel questions of law or policy or of questions involving conflict in Administrative Law Judges' decisions. Any direction for review shall state the issues with particularity. Except in extraordinary circumstances, the Commission's power to review is limited to issues of law or fact raised by the parties in the proceedings below.

29 C.F.R. § 2200.91a

These regulations implement the principles enunciated in *U.S.* v. *L. A. Tucker Truck Lines* and the cases cited above. The regulations provide that in the absence of the granting of a party's petition for review, the issue before the Commission will be limited to

that directed for review by the Commission should that method of review be invoked.

The facts in this case contain a stream of undisputed facts which clearly reveal that the Secretary did not effectively object to the settlement agreement in the manner prescribed "appropriate under its [the Commission's] practice" as required by this Court in *U.S.* v. *L. A. Tucker Truck Lines.* Those facts, in brief, are:

1. The Secretary did not file a Petition for Discretionary Review.
2. The issues directed for review were specifically described in the Direction for Review as required under the 29 C.F.R. § 2200.91a(d) which states "Any direction for review shall state the issues with particularity."
3. The issues directed for review were totally alien to the matter raised by the Secretary sixteen months later.

In its decision affirming the ALJ, the Commission properly did not consider the Secretary's self-styled Response to the Commission's Direction for Review. Had the Commission so responded it would have effectively created a gaping loophole in the discretionary nature of Commission review by allowing a party to avoid filing for discretionary review on an arguably unappealing issue and then upon the Commission's own direction for review, raising through the back door that same unappealing issue. This analysis is particularly relevant in this case in view of the Commission's own regulation that sets an even higher standard for acceptance of a petition for discretionary review in cases relating to settlements. 29 C.F.R.

§ 2200.91(b)(4). Stated conversely, if the Secretary had "effectively" raised the issue of his withdrawal from the settlement agreement with the Commission and if Sun had been able to rebut the Secretary's position on the merits, we have no doubt that the Commission would not have permitted the Secretary to withdraw from a settlement guaranteeing gas testing by qualified persons in favor of gas testing by individuals in a particular job classification. But the point of the fact is that the Commission did not rule on this issue because the Secretary did not effectively raise it. And for that reason the Court should not have decided it. Instead the Court's failure to decline jurisdiction served to evade the Commission's own rules implementing the doctrine of *Tucker Truck Lines.*

The Third Circuit's total refusal to even speak to this threshhold issue is alarming in view of not only the Supreme Court rulings, but also in view of decisions of the same Court applying *Tucker Truck Lines* and that of other Circuit Courts which have applied the doctrine to cases arising under the Occupational Safety and Health Act.

Thus, the Third Circuit Court's decision is in direct conflict with its own holding in *Hennesey* v. *Securities & Exchange Commission,* 285 F.2d 511 (3rd Cir. 1961), in which it stated:

> It is well-established that issues not *effectively* presented to an administrative agency, where ample opportunity to do so has been afforded, cannot be raised on appeal of that agency's decision. This principle may be viewed as one facet of judicially developed doctrine of "exhaustion of administrative remedies". 285 F.2d at 514 (emphasis added).

Even more to the point, the Court's refusal to decline jurisdiction is in conflict with its vigorous approval of the statutory scheme of review described above. In *Keystone Roofing Company, Inc.* v. *Occupational Safety and Health Review Commission,* 539 F.2d 960 (3rd Cir. 1976), the Court dismissed a petition by an employer because he had not sought review with the Commission. The Court's recognition of the statutory scheme is particularly relevant to the instant case:

> 29 U.S.C. § 660(a) does not require that the Commission *decide* every issue tendered to it in petitions for discretionary review. All that is necessary as a condition precedent to judicial review is that the objection be "urged before the Commission". The language and method are deliberate. The Commission must have the opportunity to correct decisions of the hearing examiners. At the same time, the statute does not have the capacity to force a backlog of cases on the Commission. In short, this statutory framework furthers two laudable goals of administrative law: it encourages the Commission to achieve uniformly applied occupational safety and health standards in furtherance of the Act's overall objectives, while guaranteeing as far as practicable that the administrative process will be efficient rather than protracted. [Footnote omitted] 539 F.2d at 964.

Notwithstanding the Court's total avoidance of the question presented, the Secretary's objection was not "urged before the Commission".

Other Courts have similarly refused to entertain issues that were not effectively urged before the Commission. In *Todd Shipyards Corp.* v. *Secretary of Labor,* 566 F.2d 1327, 1331 (9th Cir. 1978), the Court refused to consider a due process contention by the

employer since that issue had not been specifically raised before the Commission. The Second Circuit in *General Electric Company* v. *Occupational Safety and Health Review Commission,* 540 F.2d 67 (2d Cir. 1976), similarly indicated the limit of its review authority:

> We confine our review of the Commission's order to the validity of the ground upon which the agency rested its decision. *Securities and Exchange Commission* v. *Chenery,* 318 U.S. 80 (1943), 540 F.2d at 68, n.1.

In *McGowan* v. *Marshall,* 604 F.2d 885 (5th Cir. 1979), the Fifth Circuit held that a party's failure to properly respond to the Commission's Direction for Review or file a Petition for Review prohibited judicial review by that party. The Court stated:

> Accordingly, we hold that absent extraordinary circumstances, a party is precluded from obtaining judicial review of a final order of the Commission if he has failed to pursue his administrative remedies either by neglecting to file a petition for discretionary review under 29 C.F.R. § 2200.91 (a), or, in a case which has been directed for review, by failing to respond to the Commission's invitation to file briefs. 604 F.2d at 890.

The section of the Act permitting judicial review is entirely consistent with the above analysis. In pertinent part 29 U.S.C. § 660(a) states "No objection that has not been urged before the Commission shall be considered by the Court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." It is thus evident that in devising the Act, Congress intended to adhere to the traditional limitations of review common to other

administrative agencies. While it permitted a limited exception based upon "extraordinary circumstances", the Court below made no inquiry of the Secretary of such "extraordinary circumstances" and indeed the Secretary did not and could not volunteer any such evidence. See *McGowan* v. *Marshall, supra* at 891, n.19 and accompanying text.

The failure of the Court to dismiss the instant petition for want of jurisdiction places in great jeopardy the exhaustion doctrine framed by this Court and carried forward by the courts of appeals in the exercise of their judicial review. The decision, therefore, threatens to erode the unique and time tested procedures utilized by the Review Commission as well as other administrative agencies that act in an adjudicating capacity.

B. The Decision Below Raises Significant And Recurring Problems Relating To The Due Process Rights Of Private Litigants Adverse To The Effective Enforcement Of The Occupational Safety And Health Act.

The Court's decision granting the Secretary the absolute authority to withdraw from a settlement agreement at any time for any reason or no reason was based upon the Secretary's overall responsibility for the enforcement of the Act. While the Secretary's powers are broad in this regard, Petitioners submit that these powers are to be tempered by traditional notions of fairness and due process. Although the Act does not contain any specific provision relating to settlement,[2] the Secretary's powers with respect to

[2] Consistent with the purposes and policies of the Act, the Commission has implemented a rule encouraging the settlement of all contested cases. 29 C.F.R. § 2200.100. See opinion of Judge Pollack, concurring in part and dissenting in part at n.6 [App. at 34a].

standard-setting inspections, investigations citations are carefully balanced to afford private parties recourse to traditional due process safeguards. 29 U.S.C. §§ 657, 658, and 659. See *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978); *Industrial Union Department* v. *American Petroleum Institute, supra,* —— U.S. ——, 100 S.Ct. 2844 (1980).

Moreover, the Court's conclusion that the Secretary's power to withdraw from settlement agreements can be wielded in such a coercive fashion [without any reference to the facts since the agreement was consummated or the detrimental effect which the withdrawal would have on the other party] is inconsistent with the same legislative history cited by the Court for approving this extraordinary grant of authority to the Secretary. Thus, the Court heavily relied on the statement by the Senate Subcommittee on Labor that "the majority of our committee wisely concluded that the Secretary of Labor ought to be assigned the responsibility for promulgating and enforcing the standards under this act, subject to those provisions of the Administrative Procedure Act which insure that consideration of due process are fully satisfied." Nowhere in the Court's decision did it even allude to the nature of those due process guarantees.[3]

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[3] The Court's order requiring that the parties be placed in a *status quo ante* position is not pertinent to the issue of due process. First, it does not speak to the authority of the Secretary to withdraw from the agreement but only to the effects upon the Employer after he withdraws. Second, it is obvious that if the current whim of the Secretary remains a constant, a new inspection will undoubtedly result in a citation. The result will then be the same—the employer will have undertaken and complied with all the obligations of the settlement and then be required to take on a new onerous obligation in addition to what had already been agreed to.

The Court further refused to discuss those undisputed facts that should preclude the Secretary from unilaterally withdrawing from the agreement. Those facts are as follows:

First, at no time has the Secretary advanced any newly discovered evidence obtained after the initial agreement to support its new position that the settlement agreement is not in the public interest. In fact, the Secretary presented no specifics explaining the basis for his change of opinion, but relied on *ex parte* claims of the Union to the effect that only employees classified as "gas testers" can safely take gas tests—a position which the Union itself abandoned in collective bargaining when it agreed in 1977 and again in 1979 that gas testing is generally to be performed by operating personnel.

Second, there is no evidence and no contention that the procedures implemented by the Company in reliance upon the settlement agreement have been ineffective. At the same time, there is also no contention that the Company has breached the settlement or has committed new violations which could vitiate the terms of the settlement agreement, even though the Secretary has made inspections of the Marcus Hook facility since the agreement was executed.

Third, neither the Secretary nor the Court below has made any mention of the significant investment which the Company has made in implementing the agreement. This includes (a) a formal gas testing program conducted by an outside consultant; (b) preparation of a gas testing manual; and (c) an extensive in-house gas testing training program to train operating personnel.

The Court cited no authority for the proposition that in the absence of newly discovered evidence, a subsequent violation of a breach of the agreement, the Secretary retained the unilateral authority to withdraw from the agreement. In this regard, it ignored the standards for withdrawal from a settlement agreement enunciated by this Court under the National Labor Relations Act—an Act with equally significant public policy objectives that has been the subject of extensive judicial interpretation in its forty-five year history. The leading case under the NLRA is *Wallace Corporation* v. *National Labor Relations Board,* 323 U.S. 248 (1945), where the Court approved the Labor Board's policy with respect to settlements:

> To prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements. The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them. The attempted settlement here wholly failed to prevent the wholesale discard of employees as a result of their union affiliations. The purpose of the settlement was thereby defeated. Upon this failure, when the Board's further action was properly invoked, it became its duty to take fresh steps to prevent frustration of the Act. To meet such situations the Board has established as a working rule the principle that it ordinarily will respect the terms of a settlement agreement approved by it. It has consistently gone behind such agreements, however, where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice. We think this rule adopted by the Board is appropriate to accomplish the Act's purpose with fairness to all concerned.
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> 323 U.S. at 254-255.

The vitality of this principle is exemplified by the strict adherence to it in more recent cases dealing with similar issues. In referring to the *Wallace* decision, the Fifth Circuit stated:

> This holding of the Supreme Court has been interpreted to mean that a settlement agreement can be set aside and presettlement violations found, when there has been a breach of the agreement, or where there has been a subsequent independent violation of the Act by a party to the agreement. *NLRB* v. *Southeastern Stages, Inc.*, 423 F.2d 878, 880 (5th Cir. 1970).

The Sixth Circuit came to the same conclusion in *Rogers Manufacturing Company* v. *NLRB*, 486 F.2d 644 (6th Cir. 1973):

> It is of course recognized that the Board may not consider matters properly disposed by a settlement agreement "unless there is a breach of the agreement or a subsequent independent violation of the Act by the parties to the agreement". *Lincoln Bearing Co.* v. *NLRB*, 311 F.2d 48, 50 (6th Cir. 1962). 486 F.2d at 648.

Accord: *Gulf States Manufacturers Inc.* v. *NLRB*, 598 F.2d 896 (5th Cir. 1979); *NLRB* v. *Arrow Specialties Inc.*, 437 F.2d 522 (8th Cir. 1971); *NLRB* v. *Bangor Plastics, Inc.*, 392 F.2d 772, 775 (6th Cir. 1967); *NLRB* v. *Superior Tool & Dye Company*, 309 F.2d 692 (6th Cir. 1962).

It is evident that the reasoning behind this judicially accepted rule is to protect the integrity of settlements without unjustly penalizing a party who has acted in good faith reliance on the agreement and who has not engaged in any substantive unlawful conduct which, in

effect, flaunts the agreed-upon terms of the settlement. At the same time, the standards imposed under the rule, prohibit *ex parte, ex post facto* review of the settlement and thereby serve to guarantee due process to the party adversely affected by the attempted withdrawal. The Court's decision here allows for a completely contrary result.

The Court's decision will have a devastating impact upon the enforcement of the Occupational Safety and Health Act. Most citations are now settled informally and any kind of change away from resolution through settlement will cause a complete breakdown in the enforcement of the Act. Yet, the Court's decision sends a loud and clear signal to industry that battle by citations, notices of contests, hearings and appeals are preferable to achieving the Act's purposes of industrial safety and health by voluntary cooperation through settlement.

VII

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

JOHN A. MCGUINN
Counsel of Record
GARY L. LIEBER
FARMER, WELLS, MCGUINN,
FLOOD & SIBAL
1000 Potomac Street, N.W.
Washington, D.C. 20007

Attorneys for
Sun Petroleum Products Company

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

Nos. 78-1822, 79-1828.

Ray MARSHALL, Secretary of Labor,
United States Department of Labor,
Petitioner, No. 79-1822,

v.

SUN PETROLEUM PRODUCTS Co. and
Occupational Safety and Health Review
Commission, Respondents.

LOCAL 8-901 OF OIL, CHEMICAL AND ATOMIC
WORKERS INTERNATIONAL UNION,
Petitioner, No. 79-1828,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Sun Petroleum Products and Secretary of Labor,
Respondents.

Argued March 20, 1980.

Decided May 29, 1980.

As Amended June 4, 1980.

Carin A. Clauss, Sol. of Labor, Baruch A. Fellner (argued), Benjamin W. Mintz, Associate Sol. for Occupational Safety and Health, Marleigh Dover Lang (argued), Allen H. Feldman, Counsel for Appellate Litigation, Dennis K. Wade, Asst. Counsel for Appellate Litigation, Lorelei J. Borland, Atty., Marshall H. Harris, Re-

gional Sol., U.S. Dept. of Labor, Philadelphia, Pa., for Secretary of Labor.

John A. McGuinn (argued), Gary L. Lieber, Farmer, Shibley, McGuinn & Flood, Washington, D. C., for Sun Petroleum Products Co.

George H. Cohen (argued), David M. Silberman, Bredhoff, Gottesman, Cohen & Weinberg, Washington, D. C., (Robert E. Wages, Asst. General Counsel, Oil, Chemical & Atomic Workers Union, Denver, Colo. of Counsel), for Local 8-901 of Oil, Chemical and Atomic Workers International Union.

Before ALDISERT and GIBBONS, Circuit Judges, and POLLAK, District Judge.*

OPINION OF THE COURT

ALDISERT, Circuit Judge.

Two petitions have been consolidated for decision at this time. In the appeal at No. 79-1822, the Secretary of Labor has petitioned for review of a decision by an equally divided vote of the Occupational Safety and Health Review Commission, which leaves intact an administrative law judge's approval of a settlement agreement between the Secretary and Sun Petroleum Products Company. The Secretary's petition requires us to decide whether he has the authority to withdraw from the settlement without the approval of the Commission. In the appeal at No. 79-1828, the union that represents the company's employees seeks review of the Commission's decision affirming the settlement.

These two surfaces issues do not disclose the several questions lurking as threshold problems that must be

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* Honorable Louis H. Pollak, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

answered before we can reach the merits of the petitions. We have had the advantage of briefs and oral argument from the Secretary, the company, the union, and the Commission on the following issues, which we will address seriatim:

> Is a decision by two members of the Occupational Safety and Health Review Commission, divided equally, an order appealable to a court of appeals?
>
> May the Commission participate in the court of appeals as an active party on a petition for review of its decision, or is it only a nominal respondent?
>
> Does the Commission have the authority to review, and therefore the power to reject or approve, a settlement between the Secretary and an employer once a case has been scheduled for hearing before an administrative law judge?
>
> If the administrative law judge has authority to review a settlement, what is the extent of the right, if any, of affected employees to participate in the hearing?
>
> If the Commission has authority to review a settlement, does the Secretary have the right to withdraw a settlement once it has been reviewed and approved by an administrative law judge?

I.

The facts giving rise to this litigation are undisputed. On June 19, 1976, two workers were killed in a gas explosion at Sun Petroleum's refinery in Marcus Hook, Pennsylvania. Following the incident, an OSHA compliance officer inspected the site. As a result of the inspection the Secretary of Labor issued a citation on August 3, 1976, charging Sun with, *inter alia,* a serious violation of 29 U.S.C. § 654(a)(1), for failing to monitor for combustible

gases during turn-around operations.[1] The company was also served with two proposed penalties of $700 each and ordered to abate the violation immediately. Sun filed a timely notice of contest, and the Secretary issued a formal complaint on September 13, 1976. On September 30, 1976, Local Union 8-901 of the Oil, Chemical and Atomic Workers International Union elected party status in accordance with Commission Rule 20, 29 C.F.R. § 2200.20. Party status was granted on October 21, 1976. Sun filed its answer to the Secretary's complaint on November 9, 1976.[2]

Prior to a hearing before an administrative law judge, the Secretary and Sun entered into a settlement agreement on January 10, 1977. The agreement was served on all parties and provided, *inter alia* that "gas test[s] will be taken by persons knowledgeable in the care, use, and reading of the instrument, and familiar with locations where combustible gases or vapors may be present or have collected." Appendix at 26. Also as part of the settlement, Sun agreed to develop a gas testing manual within ninety days and to institute engineering and procedural changes to reduce the likelihood of accidents in the refinery. In addition, a reduction in the penalties was agreed to and Sun moved to withdraw its notice of contest. On January 19, 1977, the union filed objections to the settlement agree-

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[1] Section 654(a)(1) requires every employer, as defined by 29 U.S.C. § 652(5), to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." A serious violation is defined by 29 U.S.C. § 666(j) as one that creates "a substantial probability that death or serious physical harm could result from a condition which exists . . . in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

[2] On December 7, 1976, the Secretary was granted leave to file an amended citation and complaint, which Sun answered on December 16, 1976.

ment. Its primary objection was that the agreement failed to abate the hazard because the provision relating to gas testing did not specify that only workers classified as gas testers could test for combustible gases. The union claimed that without such a specification the company might use "unqualified" employees to conduct the testing.

On February 8, 1977, the ALJ conducted a prehearing conference during which both Sun and the Secretary asserted that the union's right to object to the settlement agreement was limited by 29 U.S.C. § 659(c) to challenging the reasonableness of the time for abatement contemplated by the settlement. The union countered that the method of abatement was relevant to determine if the time for abatement was reasonable. Rejecting the union's argument, the ALJ issued an order on April 25, 1977, approving the settlement agreement. Because the record indicated that all abatement provisions, except for the preparation of the manual, were intended to be accomplished immediately, the ALJ reasoned that the union could not contend that the abatement time was unreasonable.

Pursuant to 29 U.S.C. § 661(i) and Commission Rule 91a, 29 C.F.R. § 2200.91a(d), Commissioner Cleary *sua sponte* directed review by the Commission. The direction for review requested briefs on two questions: whether the ALJ erred in concluding that the union did not challenge the reasonableness of the abatement period, and whether the ALJ erred in concluding that the Commission lacked jurisdiction to consider the union's objections to the settlement agreement. While the case was pending before the Commission, the Secretary re-evaluated the settlement agreement. After investigating the training program for gas testers, he determined that the agreement did not fully abate the hazard and was therefore contrary to public policy. By letter from the Solicitor of Labor on July 31, 1978, the Secretary told the company of his decision and notified Sun that he would inform the Commission of his

changed position and request the Commission to remand the case for reconsideration. Accordingly, the Secretary requested that the matter be remanded to the ALJ for an opportunity to renegotiate the agreement or, alternatively, for a hearing on the merits of the citation.

Only two of the three Commission members reviewed the judge's decision.[3] Neither addressed the validity of the settlement agreement. Rather, they were divided on the disposition of the issues that had been directed for review. Chairman Cleary took the position that the ALJ's order should be vacated and the case remanded for consideration of the union's objections to the settlement agreement, while Commissioner Barnako would have affirmed because he agreed with the ALJ that the union's objections were beyond the scope of issues that the union could legitimately present for adjudication. The Commission resolved the impasse on April 27, 1979, by affirming the ALJ's order but accorded it only the precedential value of an unreviewed ALJ decision. These separate petitions for review by the Secretary and the union followed.

II.

As an initial matter, Sun challenges the jurisdiction of this court, arguing that the split vote by which the Commission affirmed the order of the ALJ did not constitute official action by a quorum of the Commission and is, therefore, not a final, reviewable order. Our jurisdictional basis for reviewing any Commission proceeding is 29 U.S.C. § 660, which provides that the courts of appeals shall have jurisdiction to review "an order of the Commission" issued pursuant to 29 U.S.C. § 659(c).

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[3] The third commissioner, Commissioner Cottine, disqualified himself from participation in the case because, prior to his appointment as a member of the Commission, he had represented the union at the hearing before the ALJ.

The method by which the Commission may take official action is prescribed by 29 U.S.C. § 661(e). Section 661(e) provides that "two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members." The Court of Appeals for the Ninth Circuit has interpreted this section to mean that an affirmance of an ALJ's order by an equally divided Commission is not reviewable by a court of appeals because it is supported by the affirmative vote of only one member, and is therefore not official action under section 661(e). *Williamette Iron & Steel Co. v. Secretary of Labor,* 604 F.2d 1177 (9th Cir. 1979), *cert. denied,* —— U.S. ——, 100 S.Ct. 1337, 63 L.Ed.2d 776 (1979); *Cox Brothers, Inc. v. Secretary of Labor,* 574 F.2d 465 (9th Cir. 1978). *See also Shaw Construction, Inc. v. OSHRC,* 534 F.2d 1183, 1185-86 (5th Cir. 1976). We disagree with this analysis and prefer the reasoning of the Court of Appeals for the Fourth Circuit set forth in *George Hyman Construction Co. v. OSHRC,* 582 F.2d 834 (4th Cir. 1978). Speaking through Judge (now Chief Judge) Lay of the Eighth Circuit, the court reasoned that inasmuch as an ALJ's decision becomes the final reviewable order of the Commission if no member directs review, *see* 29 U.S.C. § 661(i),[4] then a divided Commission vote, *a fortiori,* would permit review. Responding to the quorum requirement argument relied on in *Willamette,* Judge Lay noted:

> A review of the legislative history of § 12 of the Act [29 U.S.C. § 661] reveals no intent to limit judicial review of the Commission's decisions. The evident intent in enacting § 12 was to speed review of adminis-

[4] This section provides that the "report of the [ALJ] shall become the final order of the Commission within thirty days after such report . . . unless within such period any Commission member has directed that such report shall be reviewed by the Commission." 29 U.S.C. § 661(i). Thus, if Commissioner Cleary had not directed review in this case, the ALJ's decision would have become a final order of the Commission reviewable by this court.

> trative citations and to ensure independent review of those citations. . .
>
> Allowing the ALJ's decision to stand is analogous to the case of split decision affirmances by a court of appeals or the Supreme Court under which the lower court decision is allowed to stand.

582 F.2d at 837 n.5 (citation to legislative history omitted). In *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157 (3d Cir. 1978), without having this issue directly raised, we considered the merits of a petition emanating from an equally divided Commission. We now hold that such Commission action constitutes a final order for purposes of review in this court. Like the decision of an equally divided court, the action of an equally divided Commission may be examined by the next link in the hierarchal chain of review. As it relates to the matter before us we interpret the quorum requirement of 29 U.S.C. § 661(e) to mean that, in the context of Commission review of an ALJ's decision, that decision will stand unless two Commission members vote to the contrary.

III.

We must next decide if the Commission, one of the named respondents in these proceedings, has the authority to participate as an active party in this court on petitions for review of its decisions. The Department of Justice, which represented the Commission by brief and at oral argument, contends that the Commission does have the authority and argues that this conclusion is supported by the language of the statute as well as by the legislative history and purposes underlying the Occupational Safety and Health Act. This view has been endorsed by the Courts of Appeals for the Fourth and Fifth Circuits. *See Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 648 n.8 (5th Cir.

1976); *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1266-67 (4th Cir. 1974).

The Secretary advances a contrary view. He argues that the Commission is only a nominal party before this court because Congress did not contemplate that the Commission would function as a litigator. Indeed, according to the Secretary, the role of the Commission was envisioned as exactly the opposite. The Court of Appeals for the Ninth Circuit supports his view. *Dale M. Madden Construction, Inc. v. Hodgson*, 502 F.2d 278, 280-81 (9th Cir. 1974).

In the context of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, we faced a similar issue concerning the status of the Benefits Review Board. In determining that the Board was only a nominal respondent, we said:

> [T]he Benefits Review Board performs a review function which prior to the 1972 amendments was performed by the district courts. Certainly those courts had no duty or interest in defending their actions on appeal. There appears to be no reason why the Benefits Review Board should be thought to have such a duty or interest. At best, it is a nominal respondent, and we have no concern that it will disregard a mandate in a case in which it is not so named. The motion of the Benefits Review Board to be dismissed as a respondent will be granted.

Nacirema Operating Co., Inc. v. Benefits Review Board, 538 F.2d 73, 75 (3d Cir. 1976).

In addition to relying on the *Diamond Roofing* and *Brennan* cases, the Commission isolates two statements from the legislative history of the Act made by Senator Javits, who sponsored the amendment creating the Commission, in which he compared the Review Commission to the Federal Trade Commission, a body that does have the

authority to defend its orders in the courts of appeals. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 607, 86 S.Ct. 1738, 1744, 16 L.Ed.2d 802 (1966).[5] Senator Javits stated:

> [The Review Commission] will have the same type of authority that the Federal Trade Commission exercises . . . . It is the traditional Federal Trade Commission type of procedure.
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> . . . . . .
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> . . . The analogies between the qualifications of members and the authority of the Commission, and so forth, would be with the Federal Trade Commission.[6]

The Secretary contends that Senator Javits' analogy between the Review Commission and the FTC refers only to the FTC's role as an adjudicator, and that a reading of the surrounding text shows that the sponsor of the amendment clearly intended that the Review Commission function only as an adjudicative body and not as an administrative agency charged with the role of defending its decisions in the courts:

> It [the amendment] creates a review commission which will deal with the complaints referred to it by the Secretary and which will have the same type of authority that the Federal Trade Commission exercises: The power to issue a cease and desist order

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[5] In *Dean Foods* the Supreme Court remarked: "There is no explicit statutory authority for the [Federal Trade] Commission to appear in judicial review proceedings, but no one has contended it cannot appear in the courts of appeals to defend its orders. . . . Such ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities." 384 U.S. at 607, 86 S.Ct. at 1744.

[6] Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 at 462, 465 (Comm. Print 1971) [hereinafter cited as Legislative History].

> which, if challenged within a given period of time, can be reviewed by the Circuit Court of Appeals. Its operation is stayed if the Circuit Court of Appeals so orders. If the Secretary desires to enforce the order through the contempt power, similarly, he can go into court in order to get the Circuit Court of Appeals to enter an order for the specific purpose, and then that order can be enforced through the contempt powers of the Circuit Court of Appeals. It is the traditional Federal Trade Commission type of procedure.
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> . . . . .
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> The panel would be three members appointed by the President for a specific term—2, 4, or 6 years. A term would normally be for 6 years. The analogies between the qualifications of members and the authority of the Commission, and so forth, would be with the Federal Trade Commission.[7]

We are satisfied that the Secretary's position is the correct interpretation of the legislative intent. For example, Senator Javits argued during the floor debate:

> One other point which is critically important: What is the difference between a board to establish the standards and a commission to enforce them, and why, in my judgment, is it more important to have an autonomous and independent commission even than to have some form of board to promulgate certain standards?
>
> The reason is this: The enforcement of orders is an adjudicatory act, whereas the establishment of standards is a deliberative act. There are serious penalties involved for the individual enterprise. It is a case by case proposition. It does not apply across the board to every member of industry. One particular rubber

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[7] Legislative History, *supra*, note 6, at 462, 465.

> company, for example, can be materially disadvantaged by a finding against it in a given case, whereas established standards are an across-the-board proposition. It is entirely practical to be rather deliberate about that in hearings before the Secretary of Labor or officials of that Department. They can go into the thing deeply and if they want to contest it there is plenty of opportunity to go into court and contest the rule. But enforcement of an order or the making of an order is an adjudicatory action.[8]

For several additional reasons, we are persuaded that a detailed analysis of the legislative history further sustains the Secretary's position.

A.

First, we are impressed that the very interpretation urged upon this court by the Commission was contained in two earlier OSHA bills that were not enacted by Congress. The Javits bill, S. 2788, and the Ayres bill, H.R. 13373, sought to establish a separate national board with both rule making and adjudicatory authority.[9] Both bills expressly provided that when the Secretary appealed from a board order, the board was entitled to be represented on appeal by the Department of Justice:

> Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court and the Court of Claims, the Solicitor of Labor may appear for and represent the Secretary and the Board in any civil litigation brought under this Act but all such litigation shall be subject to the direction and control of the Attorney General: *Provided,* That in any appeal of any action of the Board brought by

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[8] Legislative History, *supra,* note 6, at 464.

[9] Legislative History, *supra,* note 6, at 36-49, 684-97.

> the Secretary . . . , the Solicitor shall represent the Secretary; the Attorney General shall represent the Board in such proceedings.

Legislative History, *supra* note 6, at 51, 699. Both bills died in their respective committee chambers. The present Act can be traced to S. 2193, the Williams bill, reported by the Senate Committee on Labor and Public Welfare (now the Human Resources Committee) and to H.R. 16785, the Daniels bill, reported by the House Committee on Education and Labor. These bills vested in the Secretary of Labor the authority to investigate, prosecute, and adjudicate employer violations, as well as the power to promulgate standards.[10] The Williams bill was amended on the Senate floor on the motion of Senator Javits to provide for the existence of an independent adjudicatory tribunal, the Review Commission, to hear disputes with respect to citations issued by the Secretary of Labor. The Williams bill, including the Javits amendment, was ultimately enacted. Pub.L.No. 91-596, 84 Stat. 1590 (1970).

Certain important conclusions concerning the nature of the Review Commission can be drawn by comparing the Javits amendment to the Williams bill with S. 2788, the earlier Javits-sponsored bill. Unlike the board proposed in S. 2788, the Review Commission that was established by the Javits amendment to the Williams bill was assigned no rulemaking authority. As Senator Javits stressed, the Review Commission was designed to perform a single function:

> [It is to be a]utonomous and independent. . . . [I]t is expressly set forth to be an independent commission, established for the purpose of dealing with these complaints and passing on them.
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> . . . . .

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[10] Legislative History, *supra* note 6, at 166-81, 865-76.

> . . . [W]e have an established practice of quasi-judicial character and a separation, a degree of autonomy in the commission which distinguishes it from authorities who have done [the] investigating, the [reporting], and so forth, in respect of the original complaint of the violation.[11]

The Review Commission's mandate, as Senator Javits proposed it, was therefore strictly limited to adjudication. Moreover, neither Senator Javits' original bill nor his amendment to the Williams bill ever contemplated Commission representation in judicial proceedings when the Secretary of Labor was not the appealing party. The clear implication to be drawn is that only the Secretary would have authority to defend agency decisions. Significantly, the Javits amendment to the Williams bill did not authorize the Department of Justice to represent the Commission in judicial proceedings, even when the Secretary was the party appealing from a Commission decision. This omission is critical since, as already noted, Senator Javits specifically provided in his earlier bill that the board be afforded such representation.

Second, an examination of the floor debates and the conference committee comments also supports the Secretary's position. In reporting the conference committee action to the Senate, Senator Prouty observed:

> The original bills introduced in both bodies provided that the Secretary of Labor would promulgate all health and safety standards and would also be responsible for deciding appeals from employers who contested violations found or penalties assessed by inspectors employed by the Department of Labor.
>
> The conference report, Mr. President, adopts provisions contained in both the House- and Senate-passed

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[11] Legislative History, *supra* note 6, at 462, 464.

bills establishing an independent Commission to review all contested cases involving violations found or penalties assessed by the Secretary of Labor. The Commission's order in turn is subject to judicial review in an appropriate U. S. court of appeals.[12]

B.

Although the Review Commission vigorously asserted at oral argument that it is a major policy-making body under OSHA, the fact is that the Act confers all rulemaking and policymaking responsibilities on the Secretary and not the Commission.[13] The Secretary possesses authority to promulgate occupational safety and health standards, 29 U.S.C. § 655, to conduct inspections and investigations, *id.* § 657, to issue citations, *id.* § 658, to propose penalties, *id.* § 659(a), to prescribe abatement periods, *id.* § 658(a), to promulgate regulations, *id.* § 657(g)(2), and to perform the day-to-day functions important to the administration of the Act, its programs, and policies. By contrast, the Commission's jurisdiction is triggered only when a cited employer files a notice of contest to a citation issued by the Secretary or when an employee challenges an abatement

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[12] Legislative History, *supra* note 6, at 1149. *See also id.* at 1147 (remarks of Senator Williams) ("This provision was designed to separate the adjudication of violations from the other functions performed by the Secretary of Labor"); *id.* at 1151 (remarks of Senator Javits) ("the bill provides for an independent three-man commission to adjudicate enforcement cases"); *id.* at 1212 ("the establishment of an independent occupational safety and health appeals commission to handle administrative adjudications") (remarks of Rep. Steiger).

[13] By rulemaking authority, we refer only to the power to promulgate standards imposing substantive occupational safety and health obligations on employers, and not to the power to devise procedural rules for administrative hearings under the Act. The Commision is given authority to promulgate procedural rules for hearings. *See* 29 U.S.C. § 661(f).

date as unreasonable. Its sole function is then to issue orders, based on findings of fact, that affirm, modify, or vacate the Secretary's citations and proposed penalties, to assess penalties, or to direct other appropriate relief. *See* 29 U.S.C. §§ 659(c), 666(i).[14]

Moreover, the Act grants the Secretary exclusive authority to enforce Commission decisions in the courts of appeals. 29 U.S.C. § 660(b). Section 14 of the Act authorizes only the Secretary to conduct OSHA civil litigation, subject to the direction and control of the Attorney General. 29 U.S.C. § 663. The Commission is not so entitled. Nor can it claim to participate as a party in appellate proceedings by virtue of being "adversely affected or aggrieved" by its own decision. *See* 29 U.S.C. § 660(a). At every turn, then, the statute denies the Commission the authority to appear in the courts of appeals.

C.

We therefore conclude that the Review Commission was designed strictly as an independent adjudicator, with no rulemaking authority other than for procedural rules for hearings, no direct policy role in administering the Act, and accordingly, no right to independent representation in judicial review procedures before this court.

IV.

Having determined that the Review Commission is an adjudicatory tribunal, we must now meet the Secretary's contention that the Commission has no jurisdiction to re-

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[14] For purposes of proceedings before it, the Commission is authorized, upon application of any party to the proceeding, to subpoena witnesses or testimony and, if necessary, to apply to the appropriate United States district court for a directing order. *See* 29 U.S.C. §§ 661(g), (h) (incorporating by reference 29 U.S.C. § 161).

view or modify settlement agreements. The Secretary argues that OSHA delegates to the Commission no specific authority to review settlements, as has been delegated to agencies by other statutes. For example, under the Federal Mine Safety and Health Amendments Act of 1977, "[n]o proposed penalty, which has been contested before the [Federal Mine Safety and Health Review] Commission . . . shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). The Longshoremen's and Harbor Workers' Compensation Act specifically provides when settlements may be approved by the Secretary. 33 U.S.C. § 908(i)(B). Under the Antitrust Procedures and Penalties Act, Congress described in detail the procedures district courts should follow in determining whether a settlement comports with the public interest. *See* 15 U.S.C. §§ 16(a)-16(i).

But the Secretary's most forceful argument is based on the legislative schema of OSHA under which a self-executing order of the Secretary automatically becomes final unless the employer or the employees' representative contests it. Section 10(c) of the Act, 29 U.S.C. § 659(c), provides that if either the employer or the employees' representative files a notice of contest to a citation or proposed penalty, the notice of contest shall be forwarded to the Commission, which shall afford an opportunity for a hearing and thereafter "issue an order, based on findings of fact, affirming, modifying or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief." The Act explicitly provides, however, that citations and abatement dates proposed by the Secretary shall become enforceable final orders without Commission action if neither the cited employer nor the employees' representative files a notice of contest. Section 10(a) of the Act, 29 U.S.C. § 659(a), provides that if an employer fails to file a notice of contest within fifteen working days of receipt of a citation or notice of penalty from the Secretary, the citation or penalty "as proposed, shall be deemed a

final order of the Commission and not subject to review by any court or agency." Section 10(b), 29 U.S.C. § 659(b), outlines an identical finality provision for notices issued by the Secretary alleging that an employer has failed to correct a violation within the abatement period. The Secretary thus argues that these sections, 29 U.S.C. §§ 659(a), (b), and (c), establish two basic points: that the Review Commission has jurisdiction only over cases in which a notice of contest is filed, and that the Commission's only statutory function is to adjudicate issues raised by a notice of contest.

We are prepared to accept most of the Secretary's arguments because we agree that in the absence of a contest, neither the Review Commission nor the ALJ has jurisdiction to review a settlement agreement entered into between the Secretary and an employer. Moreover, we agree that even after the employer files a notice of contest, if no employee files a notice or has not acquired party status under 29 C.F.R. § 2200.20, then the Commission would lack jurisdiction to review any settlement entered into between the Secretary and the employer. If an employee formally expresses an interest in the proceedings, however, we believe that the Commission would have jurisdiction to review the settlement in order to protect that interest.

The Act provides that the Commission is required to afford an opportunity for a hearing upon the happening of either of two events: (1) if the employer notifies the Secretary that he intends to contest a citation, or (2) if "any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable." 29 U.S.C. § 659(c). If settlement is reached after either of these events occurs, but prior to the scheduled hearing, the ALJ would have jurisdiction to review the settlement, but only for the limited purpose of entertaining objections from the employee or employees' repre-

sentative that the abatement period proposed by the settlement is unreasonable.

It follows, then, that if the ALJ had jurisdiction in this case, the Review Commission would have jurisdiction for this same limited purpose—to review the settlement as provided in 29 C.F.R. §§ 2200.91 and 2200.91a. Accordingly, we hold that if no employer notice of contest has been filed, or if an employee or his representative has not filed a notice to challenge the abatement period prior to the time when a settlement is entered into between the Secretary and the cited employer, then the Commission has no jurisdiction to review the settlement; but once either notice has been properly filed, the ALJ and, later, the Review Commission would have jurisdiction to review the settlement to a limited extent, to-wit, to determine whether the time fixed in the citation for the abatement of the violation is unreasonbale.

V.

Our view, of necessity, rejects the argument advanced by Sun that the union in this case was not a proper party in the Commission proceedings because it failed to file a notice with the Secretary within fifteen days of the citation as required by section 10(c) of the Act, 29 U.S.C. § 659(c).[15]

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[15] Section 10(c) provides:

If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, *or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable,* the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming,

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We do not read section 10(c) so grudgingly. If the employer files a notice of contest, as happened in this case, then the union is not required to file its notice within fifteen days of the citation because the employer's notice of contest has effectively triggered a hearing. Once the hearing mechanism is instituted, affected employees may elect to participate as parties at any time prior to the commencement of the hearing before the ALJ as provided by 29 C.F.R. § 2200.20.[16] This rule of procedure was duly promulgated by the Commission under authority granted by 29 U.S.C. § 659(c). The fifteen-day time limit for employee filing under section 10(c) is operative only when the employer has not contested the citation and a hearing is desired by the employee or his

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modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

29 U.S.C. § 659(c) (emphasis added).

[16] The regulation provides:

§ 2200.20 Party status.

(a) Affected employees may elect to participate as parties at any time before the commencement of the hearing before the judge, unless, for good cause shown, the Commission or the judge allows such election at a later time. See also § 2200.21.

(b) Where a notice of contest is filed by an employee or by an authorized employee representative with respect to the reasonableness of the period for abatement of a violation, the employer charged with the responsibility of abating the violation may elect party status at any time before the commencement of the hearing before the judge. See also § 2200.21.

representative. Under these circumstances, the time limit operates as a fail-safe mechanism to insure employees the opportunity for a hearing.

Under our interpretation we also reject the union's contention that affected employees have a right to be heard on matters other than the reasonableness of the abatement period. The Senate Committee Report makes clear that section 10(c) "gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation for abatement of a violation is unreasonably long, *to challenge the citation on that ground.*" [17] Moreover, the legislative history discloses no support for the union's position. Indeed, any evidence of congressional intent on this point contradicts the union's assertion that it is entitled to be heard on matters other than the abatement period.[18] We therefore conclude that any challenge advanced by an employee is limited to an attack on the reasonableness of the abatement period.

VI.

We now turn to the final question for decision which, because of the particular facts in this case, controls the disposition of these appeals. We must determine the extent of the Secretary's *ex parte* authority to withdraw from a settlement agreement he has entered into with a cited employer. Sun argues that there is no justification to permit the Secretary this authority. It argues that the Secretary has disclosed no newly discovered evidence obtained after the bargain was struck to support its present position that

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[17] Legislative History, *supra* note 6; at 155 (emphasis added).

[18] For example, Senator Williams succinctly defined the right of employees to appeal from the issuances of a citation and proposed penalty: "Employees are also given appeal rights *when they believe that an unreasonably long period of time has been allowed for abatement of a violation.*" Legislative History, *supra* note 6, at 414 (emphasis added).

the agreement does not protect the public interest; nor is there evidence, or even an assertion, that the procedures implemented by Sun in reliance on the agreement have been ineffective. The company contends further that this court should not disregard the substantial investment Sun has made to implement the agreement.

The Secretary responds that it is his duty to withdraw from this settlement because he has re-evaluated the information supporting the settlement and has considered reports from a subsequent inspection of Sun's refinery and other information,[19] and has determined that the settlement does not adequately protect the public interest. The Secretary's justification for his withdrawal from the settlement was expressed in a letter to Sun from the Solicitor of Labor on July 31, 1978, when the proceedings were still active before the Commission: "In sum, the Department of Labor has concluded that both the settlement entered into by the Philadelphia Regional Solicitor and Sun Oil and Sun Oil's implementation of that settlement provide for less than adequate gas testing at the worksite and therefore fail to abate the hazard cited." [20]

The chronology of events is important. The settlement agreement was reached on January 10, 1977, three months before the ALJ's decision approving the settlement on April 25, 1977. The direction for review by the Commission was ordered on May 24, 1977. On July 31, 1978, the Secretary attempted to withdraw from the agreement; and the

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[19] The Secretary also considered a labor arbitration decision in which a provision contained in Sun's collective bargaining agreement with Local 8-901 was interpreted to preclude dock personnel from acting as gas testers for safety reasons. The arbitrator's award in favor of the union was ordered enforced by the district court. *See Sun Oil Co. v. Local 8-901, Oil, Chemical, and Atomic Workers' International Union*, 421 F.Supp. 1376 (E.D.Pa. 1976).

[20] Brief for Secretary of Labor in No. 79-1822. Addendum A at 4.

Commission's divided-vote affirmance followed on April 27, 1979. Thus, the withdrawal was attempted prior to the decision of the Review Commission.

We are persuaded that, because of the Secretary's unique role in effectuating the purposes of OSHA, he has the power to withdraw from any settlement agreement prior to the entry of a final decision by the Commission. As the Supreme Court has noted, the Act creates public rights that are to be protected by the Secretary through government enforcement in the context of a complex administrative schema. *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 444-47, 97 S.Ct. 1261, 1263-65, 51 L.Ed.2d 464 (1977). "Enforcement of the Act is the Secretary's responsibility." *Dale M. Madden Construction, Inc. v. Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974). He is the Act's prosecutor. *Atlas Roofing*, 430 U.S. at 445-47, 97 S.Ct. at 1264-65. Necessarily included within these prosecutorial powers is the discretion to settle citations issued against employers and to compromise, mitigate or settle any penalty assessed under the Act. 29 U.S.C. § 655(e). When entering into settlement agreements, the Secretary seeks to implement the public policy of the Act which is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). Similarly, re-evaluation of a settlement may indicate to the Secretary that the agreement does not effectuate that purpose.

Permitting the Secretary to withdraw from a settlement agreement prior to final Commission action, we think, comports with the congressional mandate that the Secretary be entrusted with the basic responsibilities for administering the Act. As Senator Williams stated in the floor debate, there was a conscious decision to rest this responsibility in the Secretary and not in a separate board: "[T]he majority of our committee wisely concluded that the Secretary of Labor ought to be assigned the responsibility for promulgating and enforcing the standards under this act, subject

to those provisions of the Administrative Procedure Act which insure that considerations of due process are fully satisfied." [21] In interpreting the Act, courts must always heed the legislative purpose to insure that there will be coherent administration of the Act. We must heed Senator Williams' admonition to avoid a "diffusion of responsibility and accountability as to seriously undermine the effectiveness of this program." [22]

Although we conclude that the Secretary does have the power to withdraw from a settlement prior to final Commission action, dictates of fairness and justice require that all parties be placed in the position of *status quo ante* the issuance of the citation. A new inspection must be conducted pursuant to 29 U.S.C. § 657(a), and if circumstances warrant, the Secretary must issue a new citation pursuant to 29 U.S.C. § 658. Thus, neither the employer nor any affected employees will be prejudiced by the unilateral action of the Secretary. Any expenditures or implementation by the employer of the aborted agreement will be reflected in its worksite and therefore capable of being considered *ab initio* by the compliance inspector. Moreover, by returning the parties to their original position, the employer will not be required to defend stale citations under conditions in which circumstances may have changed between the time of the issuance of the citation and the withdrawal from the settlement.

Accordingly, we conclude that based on the important role placed on the Secretary by congressional mandate to protect the public interest in the safety of the work-place, the Secretary may withdraw from a settlement agreement prior to the entry of a final order by the Commission.

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[21] Legislative History, *supra* note 6, at 417.

[22] *Id.*

VII.

The Secretary's petition for review in No. 79-1822 will be granted and the cause remanded to the Commission with a direction that the Secretary be given sixty days to notify the Commission whether he elects to withdraw from the settlement or to proceed in some other manner in accordance with this opinion.[23] The appearance of the Department of Justice as counsel for the Commission will be stricken and the Commission will be removed as a party from these proceedings. The union's petition for review at No. 79-1828 will be denied.

LOUIS H. POLLAK, District Judge, concurring in part and dissenting in part.

With the bulk of the court's exposition of the Occupational Safety and Health Act, as it applies to the facts of this tortuous administrative proceeding, I am in accord: I agree that the objections filed by Oil Workers Local 8-901 to the settlement agreement entered into by the Secretary of Labor and Sun Oil vested in the administrative law judge, and thereafter in the Occupational Safety and Health Review Commission, jurisdiction to review the settlement agreement. And I agree that the Commission's affirmance —by the divided vote of the two participating Commissioners—of the administrative law judge's rejection of the Oil Workers' challenge to the settlement agreement, was a Commission decision appealable to this court. I also agree that the Commission is only a nominal party to this appeal, having no standing to appear here to defend its decision. Moreover, I agree that prior to final Commission action the Secretary had authority to withdraw from a settlement agreement which he had found, on reconsideration, would not sufficiently promote the purposes of the underlying legislation.

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[23] In view of our analysis, we perforce deny Sun's motion to strike the Secretary's brief.

But I disagree with the court's rejection of "the union's contention that affected employees have a right to be heard [in employer-initiated proceedings before an administrative law judge and the Commission] on matters other than the reasonableness of the abatement period." P. 1186. Since the court's position on this issue can be expected to have significant impact on the scope, and hence the content, of Commission adjudication, I think it appropriate to explain my views on this issue and on certain closely related issues.

A.

Section 10(c) of the Act is the key to the entitlement of employees, or of a union representing employees, to participate in hearings before the Commission. Section 10(c) provides in its entirety as follows:

> If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with Section 554 of Title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of

> factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

29 U.S.C. § 659(c)

It is apparent that the first sentence of Section 10(c) contemplates two types of hearings. The first type of hearing contemplated by Section 10(c)'s first sentence is one triggered by an employer who notifies the Secretary of an intention to contest a citation; in that hearing, employees (or a union thereof) are authorized "to participate as parties" by virtue of the last sentence of Section 10(c). The second type of hearing contemplated by Section 10(c)'s first sentence is one triggered by employees (or a union thereof) who notify the Secretary of their contention "that the period of time fixed in the citation for the abatement of the violation is unreasonable."

Manifestly, the second type of hearing—that initiated by employees (or a union)—is tied firmly to the limited agenda set by the statute: the reasonableness of the abatement period.[1] *International Union, United Auto, etc., v. United States Occupational Safety & Health Review Comm.*, 557 F.2d 607 (7th Cir. 1977). But nothing in the text of the statute confines employee/union participation "as parties" in the first type of hearing—that initiated by an employer contesting a citation—to questions relating to

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[1] Indeed, even if the employer elects, pursuant to Commission Rule 20, 29 C.F.R. § 2200.20(b), to participate in this form of employee-initiated contest, this intervention cannot broaden the relatively narrow inquiry which is the focus of this species of Commission hearing.

the reasonableness of the abatement period.[2] And, indeed, such a limitation would seem anomalous: Typically, an employer contests the Secretary's citation because the employer disputes the Secretary's finding of a violation—a finding which in many cases flows from an employee or union complaint which the Secretary is by statute required to inquire into. And it would, indeed, be odd if the words of Section 10(c) precluded employees from pursuing at the adjudicative phase of OSHA enforcement the interests the Act encourages them to monitor at the investigative phase.[3]

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[2] The fact that the Act specifically provides for employee contests on the reasonableness of the abatement period, does not, in itself, suggest any constraint on the interest of employees in regard to the existence of a violation. The Act contemplates that the Secretary's citation be in two parts: The citation must (1) describe with particularity the nature of the violation and, (2) fix a reasonable period of abatement. 29 U.S.C. § 658(a). Employees cannot themselves be cited as violators of the Act, *Atlantic & Gulf Stevedores v. OSHRC*, 534 F.2d 541 (3d Cir. 1976), and it is hard to imagine a situation where employees would wish to object to the Secretary's finding of a violation. (It is of course clear that employees may not invoke the Commission's jurisdiction over the Secretary's finding of a violation.) Thus, it is only in regard to the length of the abatement period that the Secretary's views, as formally announced in his citation, might, in some instances, be perceived as adverse to the interest of employees. But this does not mean that employees would not have a significant interest in intervening in an employer initiated contest in order (1) to support the Secretary's finding of a violation, and (2) to encourage the adoption of an effective remedial plan.

[3] The provisions for employee input into the enforcement process which are contained in the Act, apparently comprise a cohesively structured and comprehensive legislative plan for employee participation, and are not the product of haphazard drafting. As referred to the Subcommittee on Labor, S. 2193 made no allowance for employee input. That Subcommittee added provisions for the full measure of employee participation ultimately incorporated in the final bill:

Employees who believe that a violation exists may request an inspection by giving notice to the Secretary. If the Secretary de-

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The anomalous limitation not expressed in the text of Section 10(c) is supplied, so the court insists, by the report of the Senate Committee on Labor and Public Welfare. It is of course true, as the court notes, that the Committee's report recites that Section 10(c) "gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation for abatement of a violation is unreasonably long, to challenge the citation on that ground." But the report says more. The entire

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termines that there are reasonable grounds to believe a violation exists, he must conduct such inspection as soon as practicable. 29 U.S.C. § 657(f)(1). If he finds no reasonable grounds for an inspection, he must notify the employees in writing. *Id.* Provision is made to allow a representative of the employees to accompany the Secretary or his authorized representative during the physical inspection of the workplace. 29 U.S.C. § 657(e). If, upon inspection, the Secretary believes that an employer has violated the Act, "he shall with reasonable promptness issue a citation to the employer." 29 U.S.C. § 658(a). In those instances in which the Secretary finds no violation, the Act provides that the Secretary shall, by regulation, establish procedures for the informal review of his decision, and he must furnish to the employees requesting review a written statement of his reason for the final disposition of the case. 29 U.S.C. § 657(f)(2).

Thus, "while guarding against frivolous complaints," Legislative History, *infra* note 4, at 432 (Remarks of Senator Williams), by channeling employee grievances through the impartial office of the Secretary, the Act allows employees to translate their meritorious concerns for safety into employer citations. Indeed, in cases in which the employer does not contest the citation, the employees will thus have brought their grievance to the only fruition which the Act contemplates—the final determination of a violation, a schedule for abatement, and the assessment of a penalty. 29 U.S.C. § 659(a). The court holds, however, that the employees' interest in and contributions to the enforcement process, so elaborately protected through the initial stages, abruptly ceases at the moment the employer opposes their efforts by filing a notice of contest. It is my view that by providing employees the right to elect party status, Congress intended to ensure that the employees' central role in the enforcement of the Act would continue in the adjudicative arena.

relevant passage, including the language relied on by the court, shows the Committee's understanding that an employee/union challenge to the length of the proposed abatement period is but one of two modes of employee/union participation in Commission proceedings—two *distinct* modes linked by the conjunctive "also."

> If the employer decides to contest a citation or notification, or proposed assessment of penalty, the Secretary must afford an opportunity for a formal hearing under the Administrative Procedure Act. Based upon the hearing record the Secretary shall issue an order confirming, denying, or modifying the citation, notification, or proposed penalty assessment. The procedural rules prescribed by the Secretary for the conduct of such hearing must make provision for affected employees or other representatives to participate as parties.
>
> Section 10(c) *also* gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation for abatement of a violation is unreasonably long, to challenge the citation on that ground. Such challenges must be filed within 15 days of the issuance of the citation, and an opportunity for a hearing must be provided in similar fashion to hearings when an employer contests. The employer is to be given an opportunity to participate as a party.[4] (Emphasis added.)

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[4] Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 at 154-155 (Comm. Print 1971) [herein cited as Legislative History]. The bill referred from committee, which is addressed in the above passage, contemplated hearings within the Department of Labor; hence, the allusion in the excerpt to hearings before the Secretary. As detailed in the opinion of the court, however, the enforcement scheme was modified on the Senate floor to provide for review before an independent administrative body in the form of the Review Commission.

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This very litigation illustrates the anomaly generated by confining the employee/union role in employer-initiated proceedings to a challenge to the reasonableness of the abatement period. Local 8-901's difficulty with the remedy incorporated in the settlement agreement was not that its effective date was remote. To the contrary, the settlement agreement contemplated that the remedy would go into effect at once. The problem, as Local 8-901 saw it, was that the remedy agreed upon by Sun and the Secretary would be totally inefficacious—in that monitoring potential fire hazards at the refinery would be placed in the hands of employees whom the union deemed to be inadequately trained to fulfill their critically important tasks. By not permitting the union to pursue these issues, the administrative law judge seems to have guaranteed that the hearing on the settlement agreement would be an antiseptic ritual leading to perfunctory approval. At all events, the very shortcomings in the agreed remedy which the administrative law judge would not let the union probe were those which led the Secretary, more than a year later, to withdraw his assent from the settlement agreement.

The court appears to acknowledge that Local 8-901's timely request for party status conferred on the administrative law judge, and ultimately on the Commission itself, jurisdiction to entertain the union's objections on all matters with respect to which it had on interest under the Act. My difference with the courts is that I take a more spacious view of the interest assertable by the union in an employer-initiated proceeding. Before the administrative law judge, the union objected that the settlement proposed by Sun and the Secretary was inconsistent with the purposes of the Act in that it would fail to abate the cited condition.

Apart from the substitution of the Review Commission for the Secretary, procedures set forth in the final Act are, in all relevant respects, identical to those which are the subject of this Committee Report.

Since I find that this was a subject well within the scope of the union's permissible concerns, I would hold that the union was entitled not only to have its objections considered, but also to support those objections through the presentation of evidence in a hearing before the administrative law judge.[5]

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[5] This approach comports with procedures applied to the settlement of cases before the National Labor Relations Board. See *Marine Engineers Beneficial Assn. v. NLRB*, 202 F.2d 546, 549 (3d Cir. 1953), *cert. denied*, 346 U.S. 819, 74 S.Ct. 32, 98 L.Ed. 345; *Terminal Freight Cooperative Ass'n v. NLRB*, 447 F.2d 1099, 1011 (3d Cir. 1971), *cert. denied*, 409 U.S. 1063, 93 S.Ct. 553, 34 L.Ed.2d 516 (1972); *Leeds & Northrup Company v. NLRB*, 357 F.2d 527 (3d Cir. 1966). In *Marine Engineers*, this court grappled with the then unfamiliar role of the charging party in Labor Board proceedings:

> The difficulty in this case comes because in changing times and the evolution of administrative procedure our old analogies are not in point. The charging party in a labor case is something like a complaining witness in a criminal case. But he is certainly more than that for a complaining witness is certainly not entitled to appeal even when an appeal is allowed for the prosecution in a criminal case. On the other hand, the charging party is not like the ordinary plaintiff in a lawsuit, who does not have to have anybody's permission to go ahead with his action if he can pay the required fees. This is something in between.

202 F.2d at 549. The court went on to hold that the charging party in a Labor Board case had a right to be heard on settlement objections to present evidence on that issue, and to appeal an adverse ruling. *Id.* Other circuits are generally in accord. See *George Ryan Co. v. NLRB*, 609 F.2d 1249 (7th Cir. 1979); *ILGWU v. NLRB*, 501 F.2d 823 (D.C.Cir. 1974); *NLRB v. ODCAW*, 476 F.2d 1031 (1st Cir. 1973); *Concrete Materials of Georgia v. NLRB*, 440 F.2d 61 (5th Cir. 1971); *NLRB v. Electrical Workers Local 357*, 445 F.2d 1015 (9th Cir. 1971).

OSHA procedures and those under the National Labor Relations Act are, of course, not strictly analogous. The NLRA does not, in terms, provide that the charging party can participate as a party to Board proceedings. Nor does the NLRA provide the charging party with the elaborate protections afforded employees

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B.

Although the court imposes limits I do not subscribe to on the scope of employee/union party status in a proceeding initiated by the employer's contest of a citation issued by the Secretary, the court acknowledges that employee/union assertion of party status gives the administrative law judge and the Commission a revisory jurisdiction—at least to the extent of passing on properly raised union challenges—which cannot be ousted by a subsequent settlement agreement between the Secretary and the employer. At the same time, the court announces that in the absence of employee/union assertion of party status the commission jurisdiction which attaches when an employer files a notice of contest evaporates at such time as the Secretary and the employer enter into a settlement agreement.

Much can be said for the position announced by the court —a position which assumes that in the absence of objection from an interested party there is no reason for the Commission to second-guess the judgment of the Secretary that a particular settlement agreement will promote the purposes of the Act. On the other hand, there are counter-

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under OSHA. Seemingly of even greater significance, in contrast with the position of the Secretary under the OSHA scheme, the General Counsel of the National Labor Relations Board enjoys the statutory discretion not to issue a complaint even if there exists a violation of the Act. Each of these distinctions would appear to suggest broader rights for employees under OSHA, than under the NLRA. But under Labor Board rules, once the General Counsel issues a complaint, "the charging party is accorded formal recognition: he participates in the hearings as a 'party,' . . . he may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner . . ." *International Union, etc. v. Scofield*, 382 U.S. 205, 219, 86 S.Ct. 373, 382, 15 L.Ed.2d 272 (1965). It is improbable that Congress, writing against this backdrop of the National Labor Relations Act practice, could have intended any lesser role for the complaining employees under OSHA by explicitly providing them the right "to participate as a party."

arguments which suggest the utility of an independent check on the Secretary's discretion. Such counter-arguments seem to be reflected in the Commission's rule in force when this settlement agreement was entered into, which contemplated that all settlement agreements arrived at after the Commission's jurisdiction attached would be submitted to the Commission for approval.[6] And the revised rule now in force, endorsed by the Secretary prior to its adoption by the Commission on December 5, 1979, recites that, "A settlement proposal shall be approved [by the administrative law judge or the Commission] when it is consistent with the provisions and objectives of the Act."[7]

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[6] Commission Rule 100, 29 C.F.R. § 2200.100, in effect at the time of the proposed settlement in this case, provided in full:

Settlement

(a) Settlement is encouraged at any state of the proceedings where such settlement is consistent with the provisions and objectives of the Act.

(b) Settlement agreements submitted by the parties shall be accompanied by an appropriate proposed order.

(c) Where parties to settlement agree upon a proposal, it shall be served upon represented and unrepresented affected employees in the manner set forth in § 2200.7. Proof of such service shall accompany the proposed settlement when submitted to the Commission or the Judge.

[7] The revised rule, 29 C.F.R. § 2200.100, which became effective on January 1, 1980, 44 Fed. Reg. 70,106 (1979), provides in full:

Settlement

(a) *Policy.* Settlement is permitted at any stage of the proceedings. Settlements submitted for consideration after the Judge's decision has been directed for review shall be filed with the Executive Secretary. A settlement proposal shall be approved when it is consistent with the provisions and objectives of the Act.

(b) *Requirements.* Every settlement proposal submitted to the Judge or Commission shall include, where applicable, the following:

(1) A motion to amend or withdraw a citation, notification

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Where the balance of wisdom—and, to the extent detectable, of statutory instruction—lies on this issue, I have no settled view. More to the point, I do not regard it as necessary to resolve the issue in the context of this case, since in this instance I would hold that, because Local 8-901 had elected party status and had raised a cognizable objection to the settlement proposal, the Commission remained seized of the jurisdiction it had acquired before the settlement agreement was entered into—at least until the Secretary undertook to withdraw from the settlement agreement.

C.

I concur in the court's holding that the Secretary, in the exercise of his duty to enforce the Act, is entitled to withdraw from a settlement agreement with an employer which he concludes does not protect the safety and health of employees with the efficacy called for by the Act. I also concur in the court's view that the Secretary's occasional exercise of the authority to withdraw from an agreement solemnly entered into should be tempered by the need to protect the employer from loss occasioned by the employer's detrimental reliance on the agreement the Secretary proposes to jettison. Accordingly, inasmuch as prior to the

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of proposed penalty, notice of contest, or petition for modification of abatement;

(2) A statement that payment of the penalty has been tendered or a statement of a promise to pay; and

(3) A statement that the cited condition has been abated or a statement will be accomplished.

(c) *Filing; service and notice.* When a settlement proposal is filed with the Judge or Commission, it shall also be served upon represented and unrepresented affected employees in the manner prescribed for notices of contest in § 2200.7. Proof of service shall accompany the settlement proposal. A settlement proposal shall not be approved until at least 10 days following service of the settlement proposal on affected employees.

unfolding of this very litigation Sun would presumably have no ground for anticipating that the Secretary would turn out to have not only the disposition but also the authority to change his official mind. I concur in holding that the Secretary must go back to the *status quo ante* if he persists in his announced withdrawal from the Sun settlement. But the result dictated by the equities here may not necessarily apply in future instances of withdrawal, should there be any: for today's holding now makes it patent that OSHA settlement agreements are not proof against Secretarial second thoughts. Wherefore, I would reserve to another day, when an answer is insistently called for, the question whether a return to the *status quo ante* is required of, or even open to, the Secretary in all situations in which he concludes that an OSHA settlement agreement was improvidently entered into.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1822

RAY MARSHALL, Secretary of Labor, United States Department of Labor,

Petitioner,

VS.

SUN PETROLEUM PRODUCTS CO.
(OSHRC No. 76-3749)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges,* and POLLAK, *District Judge.**

The petition for rehearing filed by Respondent in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ ALDISERT
Judge

Dated: June 26, 1980

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* Honorable Louis H. Pollak, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

SUN PETROLEUM PRODUCTS COMPANY

REVIEW COMMISSION DECISION

SECRETARY OF LABOR, Complainant v. SUN PETROLEUM PRODUCTS COMPANY, Respondent, LOCAL 8-901 OF OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, Authorized Employee Representative, OSAHRC Docket No. 76-3749, April 27, 1979.

Marshall H. Harris, Philadelphia, Pa., for complainant.

John A. McGuinn, Washington, D.C., for respondent, Sun Petroleum Products Company.

Steven Wodka, Washington, D.C., for employees.

Review Commission Judge William E. Brennan.

Before Cleary, Chairman, and Barnako, Commissioner.*

BY THE COMMISSION:

The Secretary of Labor cited Respondent (Sun Petroleum) for allegedly committing a serious violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 [1] by failing to adequately monitor a particular area at its Marcus Hook, Pennsylvania, refinery for the presence of combustible gases. Sun Petroleum contested the

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* Prior to his appointment as a Member of the Commission, Commissioner Cottine appeared as counsel at the hearing before the administrative law judge in this case. Accordingly, he has disqualified himself from participating in this case. ABA, *Code of Judicial Conduct*, Canon 3C(1)(b) (1972); *See* 28 U.S.C. § 455 (b)(2).

[1] 29 U.S.C. 651 et seq., hereinafter, "the Act." Section 5(a)(1) provides that

> Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

citation and Local 8-901 of the Oil, Chemical and Atomic Workers International Union (the Union) adopted party status in the resulting proceedings, before the Commission. Thereafter, prior to a hearing, the Secretary and Sun Petroleum entered into a settlement agreement resolving the issues in dispute between them. The Union objected to the proposed settlement but, following a hearing on the Union's objections, Judge William E. Brennan entered an order approving the settlement. Chairman Cleary directed that the order be reviewed by the Commission pursuant to Section 12(j) of the Act.[2]

Having reviewed the entire record, the Commission members are divided on the appropriate disposition for the reasons set forth below. In view of the statutory purpose of expeditious adjudication, the members agree to resolve their impasse by affirming the Judge's order but according it the precedential value of an unreviewed judge's decision. *Life Science Products Co.*, 77 OSAHRC 200/A2, 6 BNA OSHC 1053, 1977-78 CCH OSHD ¶ 22,313 (No. 14910, 1977), aff'd, No. 78-1014 [7 OSHC 1031] (4th Cir. Feb. 1, 1979).

The settlement agreement entered into by the Secretary and Sun Petroleum provided that Sun Petroleum would withdraw its notice of contest thereby admitting, for purposes of this proceeding, that it violated Section 5(a)(1) as alleged. The agreement specified that Sun Petroleum would abate the violation by monitoring for combustible gases in the cited location, and that

> said gas test will be taken by persons knowledgeable in the case, use and reading of the instrument, and familiar with locations where combustible gases or vapors may be present or have collected.

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[2] The settlement agreement also resolved a citation alleging Sun Petroleum's violation of the safety standard at 29 C.F.R. 1910.132 (a). The Union does not take exception to that aspect of the settlement agreement.

The agreement did not explicitly mention an abatement date. The citation, however, specified an immediate abatement requirement, and Sun Petroleum's agreement to withdraw its notice of contest left this unchanged. Accordingly, the settlement provides for immediate abatement, and the parties understand that to be the case.

In arguing to the Judge that the agreement should not be approved, the Union primarily contended that the above-quoted language did not adequately provide for abatement of the violation. It argued that the settlement should explicitly state that full time gas testers must perform the tests. The Union asserted that, without such a provision, the company may use production employees, who are not as well qualified as gas testers, to conduct the tests, and that the agreement will therefore fail to achieve abatement of the cited hazard. The Union contended that the Commission's authority under Section 10(c) of the Act to grant "other appropriate relief" permits the Commission to specify the means an employer must use to correct a violation. The Secretary and Sun Petroleum, on the other hand, argued that the agreement adequately provided for abatement of the violation, and that it was beyond the Commission's authority to require more specific abatement measures.

The parties also argued the effect of the Commission's decision in *Local 588, United Auto Workers (Ford Motor Co.)*, 76 OSAHRC 58/B8, 4 BNA OSHC 1243, 1976-77 CCH OSHD ¶ 20,737 (No. 2786, 1976), *aff'd*, 557 F.2d 607 [5 OSHC 1525] (7th Cir. 1977). In that case, the Secretary and an employer agreed to an abatement plan to which the affected employees objected by filing a notice of contest pursuant to section 10(c) of the Act requesting the Commission to modify the plan to which the other parties had agreed. The Commission held that it lacked authority to modify the plan, and that the Act did not grant the em-

ployees the right to contest an abatement plan except as to the time allotted for abatement. The employees could, however, dispute the time period allotted for abatement, and to that end could present evidence as to alternative abatement means for the purpose of showing that abatement could be accomplished in a shorter time than that specified in the plan. The Union attempted to bring this case within the confines of *Local 588, United Auto Workers,* arguing that if a settlement agreement did not adequately provide for abatement, then abatement would not be accomplished within the period permitted by the plan and that its objection therefore did concern the time allotted in the agreement for abatement.

Finally, the Union contended that the settlement agreement should contain an admission by Sun Petroleum that the violation was willful, despite the fact that the citation and complaint contained no such allegation.

Judge Brennan rejected the Union's objection to the abatement requirement contained in the settlement agreement. He noted that, since the agreement provided for immediate abatement, the Union's objection could hardly be construed as going to the time allowed for abatement. Thus, relying on *Local 588, United Auto Workers,* he concluded that, by objecting to the abatement method specified in the agreement, the Union had not raised a justiciable issue. The Judge did not explicitly deal with the Union's contention that the violation should be classified as willful.

On review, the Union and Sun Petroleum make the same arguments they made before the Judge. Sun Petroleum further contends that the Commission lacks any authority to interfere with a settlement agreement between the Secretary and an employer. The Secretary now agrees with the Union that the abatement order contained in the settlement agreement is inadequate, and requests that we remand

for the purpose of allowing the agreement to be renegotiated.[3]

As a threshold matter, both Commission members reject Sun Petroleum's contention that the Commission lacks authority to rule on the propriety of a settlement agreement reached between the Secretary and a cited employer. Although the Commission's rules encourage parties to settle their disputes, 29 C.F.R. 2200.100, such settlements must be consistent with the objectives of the Act, and the Commission retains the authority to make that determination when a proposed settlement is submitted. *Blaisdell Manufacturing, Inc.*, 73 OSAHRC 53/B8, 1 BNA OSHC 1406, 1973-74 CCH OSHD ¶ 16,915 (No. 1566, 1973).

Chairman Cleary would vacate the judge's order and hold that the Commission has jurisdiction to consider the Union's objection to the settlement proposed by the other parties. He notes that the *Local 588, United Auto Workers* case is not pertinent to this proceeding. The primary issue addressed in that case concerned the scope of the right of employees under section 10(c) of the Act to file a notice

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[3] The Secretary's position is set forth in his "Response to Direction for Review," which was filed more than eleven months after the parties were notified that the Secretary's third request for an extension of briefing time was denied. Sun Petroleum has moved to strike the Secretary's response as untimely. Chairman Cleary's disposition is based solely on the Union's right to raise objections to a settlement agreement in an action instituted by an employer's notice of contest, and is arrived at independent of the Secretary's response. He thus considers the motion to strike to be moot. Commissioner Barnako would grant the motion to strike and has not considered the Secretary's response.

On March 14, 1979, Sun Petroleum moved to supplement the record with a collective bargaining agreement between the Company and the Union dated March 1, 1979. Sun contends that this agreement demonstrates that the Secretary's position regarding the inadequacy of the abatement order lacks merit. As we do not rely on the Secretary's argument in disposing of the case, we deny Sun Petroleum's motion.

contesting a citation and thereby invoke the Commission's jurisdiction. As noted above, the Commission obtained jurisdiction in this proceeding when respondent filed a notice of contest. A recently decided case does, however, address the issue presented here. In *Kaiser Aluminum & Chemical Corporation*, 78 OSAHRC 103/A2, 6 BNA OSHC 2172, 1978 CCH OSHD ¶ 23,200 (No. 76-2293, 1978), the Commission held that the Act requires that affected employees with party status be afforded the opportunity to review and raise objections to settlements proposed by the other parties, including objections to matters other than the abatement period specified in a settlement proposal. Accordingly, the Chairman would remand this case for further proceedings consistent with Commission precedent.

Commissioner Barnako would affirm the Judge's order approving the settlement agreement. In his view, the Commission's authority to direct "other appropriate relief," 29 U.S.C. 659(c), does not include specifying the precise means that an employer must follow to abate a violation. *Local 588, United Auto Workers,* supra. The agreement requires Sun Petroleum to immediately abate the violation. If Sun Petroleum does not take the steps necessary to eliminate the hazard for which it was cited, then the Union's proper recourse is to so inform the Secretary, who is authorized to enforce the abatement order, either through a petition for enforcement to a court of appeals, 29 U.S.C. 660(b), or the issuance of a notification of failure to correct and proposed additional penalties. 29 U.S.C. 659 (b) and 666(d).

Commissioner Barnako would also reject the Union's attempt to have the Commission find the violation to be willful. The Commission has held, in recognition of the Secretary's exclusive prosecutorial authority under the Act, that it cannot find a violation of a higher degree than alleged by the Secretary without the Secretary's consent. *Wetmore & Parman, Inc.,* 73 OSAHRC 2/C5, 1 BNA

OSHC 1099, 1971-73 CCH OSHD ¶ 15,400 (No. 221, 1973). The Secretary knows of the Union's position that the violation should be alleged to be willful and of the reasons underlying the Union's position, yet has not sought to amend his pleadings to contain such an allegation. Accordingly, the issue is not properly before the Commission.

Since the Union's objections to the settlement agreement are beyond the scope of the issues the Union can legitimately present for adjudication, Commissioner Barnako would approve the agreement. *See IMC Chemical Group, Inc.*, 78 OSAHRC 95/C14, 6 BNA OSHC 2075, 1978 CCH OSHD ¶ 23,149 (No. 76-4761, 1978) (dissenting opinion).

Accordingly, the Judge's decision is affirmed.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 76-3749

SECRETARY OF LABOR

Complainant

v.

SUN PETROLEUM PRODUCTS COMPANY AND LOCAL 8-901 OF THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION

Respondents

ORDER GRANTING STIPULATED SETTLEMENT

Brennan, William E.; A.L.J.

This matter comes on for determination pursuant to 29 U.S.C. 659(c) and 661(i) and Commission Rules 50 and 100, 29 C.F.R. 2200.50 and 2200.100, upon a Settlement Agreement originally received by the Commission on January 13, 1977, involving one Serious Citation (two numbered Items) and Notification of Proposed Penalties in the total amount of $1400 issued to Respondent by the Complainant on August 3, 1976.

On January 21, 1977, Local 8-901 of the Oil, Chemical and Atomic Workers Union (having previously been accorded party status (see Order dated October 21, 1976, R.p. J-7)), through its representative, filed objections to this Settlement and requested a hearing thereon (R.p. J-29). These objections, *inter alia*, set forth the following:

"1) The key provision [of the Settlement Agreement] is Section 1(A)(B) which states:

> 'said gas test will be taken by persons knowledgeable in the care, use, and reading of the instrument, and familiar with locations where combustable gases or vapors may be present or have collected.'

> It is our position that the only persons that meet this criteria in the refinery are the workers in the gas tester classification.
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> * * *
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> It was the company's use of regular operating personel to perform gas tests that caused the fire which resulted in the death of two workers and the issuance of the citation.
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> * * *
>
> 2) The position of the Union as to the proper classification to perform the gas testing was upheld by the arbitrator in *Sun Oil Company of Pennsylvania and Oil, Chemical and Atomic Workers Local 8-901,* AAA#M30 1021 73J No. 20. This arbitrator's award was further upheld by the U.S. District Court in *Sun Oil Company of Pennsylvania* v. *Local 8-901, Oil, Chemical and Atomic Workers International Union.*
>
> * * *
>
> In summary, based on the fact that the settlement agreement would fail to abate the hazard and fails to acknowledge a willful violation, we hereby request its rejection by the Commission." (R.p. J-29).

Settlements are ruled upon by the Review Commission pursuant to the provisions of its Rule of Procedure 100(a), which provides:

> "Settlement is encouraged at any stage of the proceedings where such settlement is consistent with the provisions and objectives of the Act." (29 C.F.R. 2200. 100(a)).

Thus, a hearing on the Union's objections as requested was noticed by Order dated January 21, 1977 (R.p. J-30), which was rescheduled upon the Union's request for February 8, 1977 (R.p. J-31, J-32).

On February 4, 1977, there was received a Motion from Respondent Company requesting a pretrial conference on the morning of the scheduled hearing, on the grounds that Review Commission precedent in *Sec. of Labor* v. *Ford Motor Co., Metal Stamping Division,* Docket No. 2786 (5/25/76) prohibited the relief sought by the Union's objections as it was held therein that a union may only contest and object to the period of abatement (R.p. J-33).

This request was granted by Order dated February 4, 1977 (R.p. J-34).

On February 8, 1977, a recorded pretrial conference was held, all three parties appearing through counsel.

The Union maintained its two basic objections, arguing essentially that in order to determine if the time within which to abate is reasonable, the method of abatement necessarily must be considered. In a case involving *future* abatement, this principal is sound.

However, in this case, counsel for the Company, concurred in by Complainant's counsel, represented on the record that all abatement provisions set forth in the Settlement Agreement (except for the preparation of a manual within 90 days), were intended to be accomplished immediately upon the entrance of an Order approving the Settlement Agreement. Consequently, the Union could not object to the "immediate" time period for abatement as unreasonable.

It persisted in its argument however, that adherence to the Stipulated abatement terms would not effect complete abatement of the type of condition causing the fatalities herein, because gas or vapor testing could be done by operating personnel who were not "gas testers." The response to this argument was that if the union believes any gas testing is carried on by personnel not identified in the Settlement Agreement abatement provisions, the Complainant would, upon notice thereof, issue a Failure to Abate Citation to the Respondent Company.

Consequently, based upon the Commission precedent announced in *Sec. of Labor* v. *Ford Motor Co., supra,* and *Sec of Labor* v. *United States Steel Corp.,* Docket No. 2975,. *et al.* (1/17/77),[1] it was concluded that because the Union herein did not challenge the "immediate" time period for abatement intended by the Settlement Agreement, there was a lack of jurisdiction to entertain evidence on the question of the means or manner of effecting abatement.

Thus, the Stipulated Settlement Agreement was found to comply with the Commission's requirements for "hospitable consideration," (See, *Sec. of Labor* v. *Dawson Brothers Mechanical Contractors,* 1 OSAHRC 386 (2/22/72)), and based upon the representations set forth in this Agreement, and the representations of counsel during the pretrial conference, it was approved. Further, the Serious Citation and the proposed penalties based thereon, which had been reduced to $1000 in the Settlement Agreement, and had been paid (TR 88), were affirmed. The Respondent Company's Motion to Withdraw its Notice of Contest was Granted (TR 69-70).

Lastly, to carry out abatement at the earliest possible moment, consistent with the intention of Complainant and Respondent Company, as voiced by counsel, the approval date of the Settlement Agreement was entered as of the date of the Pretrial Conference, February 8, 1977 (TR 88).

It is so Ordered.

/s/ William E. Brennan
William E. Brennan
Judge, OSHRC

Dated: April 25, 1977
Hyattsville, Maryland

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[1] Which precedent binds the undersigned, See, *Sec. of Labor* v. *Gindy Manufacturing Co.,* 10 OSAHRC 367 (1974) ; *Sec. of Labor* v. *Grossman Steel & Aluminum Corp.,* Docket No. 12775 (5/12/76).

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 76-3749
REGION III

W. J. USERY, JR., SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Complainant,

v.

SUN PETROLEUM PRODUCTS COMPANY, a Division of
SUN OIL COMPANY OF PENNSYLVANIA,
Respondent.

SETTLEMENT AGREEMENT

I. The parties agree to the following settlement of the Citation issued to Respondent relative to turn-around operations at Plant 8-C of Respondent's Marcus Hook Refinery:

A. In the course of a turnaround operation at the 8-C Plant, during the time of the lighting of a pilot or first burner in a fired heater:

1. the person or persons lighting off said pilot or burner and anyone in the immediate vicinity of said pilot or burner who may be directly exposed of flashback during lighting, shall wear fire retardant clothing.

2. prior to the lighting of pilot or first burner in a fired heater, a gas test shall be taken in the firebox and in areas in the immediate vicinity of the fired heater or burner where combustible gases or vapors might be present.

3. said gas test will be taken by persons knowledgeable in the care, use, and reading of the instrument, and familiar with locations where combustible gases or vapors may be present or have collected.

4. all such gas tests shall be recorded as to the time, place, date, name or initials of the persons taking the test and the results of these tests.

B. A gas testing manual is to be developed by the Company within three months. This manual is to include areas where combustible gases or vapors might be present due to leaks from flanges, valves or other openings in the system or where they might have collected due to open vents, sewers or other enclosed spaces, and indicate that the test results will be brought to the attention of the person requesting the test. The manual will be made available to operating personnel, included in the initial refresher training, and be made part of standard practice for taking gas tests.

C. Engineering and Procedural changes shall be implemented to prevent recurrence of the recent accident in Plant 8-C, as set forth in Appendix I, "Equipment Revisions Intended to Ensure Safe Operation of H-2 Heater at Plant 8-C", and Appendix II, "Procedural Revisions to Ensure the Safe Coking of H-2 Heater in future shutdowns".

II. Respondent agrees to continuing compliance with the applicable provisions of the Occupational Safety and Health Act of 1970 and regulations duly promulgated pursuant thereto.

III. Copies of the Citation and this Settlement Agreement have been served upon the authorized employee representative, Local 8-901, Oil, Chemical and Atomic Workers' International Union, AFL-CIO and its representative herein, in accordance with Commission Rule 7, and Order dated October 21, 1976.

IV. Based upon the foregoing Complainant and Respondent agree that the proposed penalties imposed be reduced from $700 each for the cited violation of 29 C.F.R. § 1910.

132(a) and 29 U.S.C. § 654(a) to $500 each. The Complainant and Respondent agree that the reduced penalty of $1000 is appropriate under the circumstances.

V. In view of the foregoing, Respondent hereby moves to Withdraw its Notice of Contest in the above-captioned case.

This Settlement Agreement entered into by and between the parties this —— day of January, 1977.

SUN PETROLEUM PRODUCTS COMPANY,
a division of
SUN OIL COMPANY OF PENNSYLVANIA

/s/ JONATHAN C. WALLER

/s/ JOSEPH D. ZULLI
Attorneys for Respondent

UNITED STATES DEPARTMENT OF LABOR

/s/ MARSHALL H. HARRIS
Marshall H. Harris
Regional Solicitor

/s/ HOWARD K. AGRAN
Howard K. Agran
Attorney

Attorneys for Complainant

APPENDIX 1

Equipment Revisions
Intended To Ensure The Safe Operation
Of H-2 Heater At Plant 8-C

1. A 3″ connection with a valve has been installed at the main reduced crude regulator of H-2 heater. This will permit injection of steam to the coils of H-2 heater in such a way that the steam flow to each coil can be controlled and measured. The coils can be steamed individually or simultaneously.

2. 135# steam will be permanently piped to the new 3″ connection. This installation will be designed in such a way that the valves will be easily accessible and can be operated safely, particularly during emergencies.

3. The original 1″ steam lines to the four individual coils will be retained as a back-up system for the new 3″ steam system described above. Each of the 1″ steam lines has now been equipped with its own separate control valve.

4. A quench pot will be installed at the outlet of the heater coils as so that the effluent will be discharged under control into a safe area, i.e., away from any possible ignition source; away from any possible human contact.

5. Two 3″ stainless steel valves with blanks will be installed in both of the 14″ crab outlets of H-2 heater. This will allow a visual check to assure the satisfactory completion of the steaming procedure, i.e., no oil emitted with the steam exhausting from the heater outlets. (The 3″ stainless steel connections for these valves have already been installed.)

APPENDIX 2

Procedural Revisions
To Ensure The Safe Coking Of H-2 Heater
In Future Shutdowns

1. Blanks to prevent oil from entering the furnace will be installed as soon as possible after oil has been diverted away from the furnace.

2. After all of the blanks are installed to isolate the oil to the furnace, the coils will be steamed for 4 hours directly into the Vacuum Tower to fully evacuate each coil.

3. At the beginning of the steaming procedure, all four individual coils will be steamed separately to assure sufficient steam flow in each coil. Once this has been established, then all four coils will be steamed simultaneously for four hours.

4. During the steaming procedure, the steam flow through each of the coils will be monitored continuously to make certain that each coil is being steamed properly. This will be done by way of continuous flow and temperature recorders that are located in each of the individual coils.

5. At the end of the steaming procedure, a visual check will be made at two newly installed 3″ connections at the heater outlet to assure that the procedure has been carried out successfully, and that the equipment is safe to open to the atmosphere to proceed to the "coking" step.

6. Once the steaming procedure is complete, the 14″ outlet lines of the heater will be isolated from the Vacuum Tower. Both of these lines will be vented by way of a 3″ valve through a quench pot to the atmosphere, to be installed prior to the next scheduled shutdown of the heater.

7. Once the heater outlets have been vented to the atmosphere, each of the four coils of the heater will again be steamed individually to determine that they have been properly safed. This will be done by checking the effluent from each coil at the quench pot.

8. The "coking" procedure will not be started until the safing procedure has been carried out to complete satisfaction.